IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-361

BOSTON HOSPITAL FOR WOMEN,

Petitioner,

LUKE GILLESPIE,

Co-Defendant,

—against—

GLORIA SCHWARTZ and WILLIAM SCHWARTZ,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SOLOMON M. CHESER
Counsel for Petitioner
116 John Street
New York, New York 10038
(212) 233-5100

INDEX TO BRIEF

Cases Cited

United States Constitution Cited

PAGE

Rules Cited

Statutes Cited

INDEX TO APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No.

BOSTON HOSPITAL FOR WOMEN,

Petitioner,

LUKE GILLESPIE,

Co-Defendant,

—against—

GLORIA SCHWARTZ and WILLIAM SCHWARTZ,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Boston Hospital for Women, respectfully prays that a writ of certiorari issue to review the order and opinion of the United States Court of Appeals for the Second Circuit entered in these proceedings on June 12, 1978 and docketed as a judgment in the District Court for the Southern District of New York on July 17, 1978.

Opinion Below

The as yet unreported opinion of the United States Court of Appeals (2d Cir.), *sub nom. O'Connor* v. *Lee-Hy Paving Co.*, inter alia, including the instant case, *Schwartz* v. *Boston Hospital for Women* and *Luke Gillespie*, appears in the Appendix to the petition for a writ of certiorari, filed on behalf of Luke Gillespie, the co-defendant herein. Its order of affirmance, dated June 12, 1978, is also found in such Appendix. Its order docketed as a judgment in the United States District Court for the Southern District of New York appears in the Appendix hereto. The endorsement order, dated October 21, 1977, of District Judge Morris E. Lasker in the aforementioned action entitled *Schwartz* v. *Boston Hospital for Women et ano.* in the United States District Court for the Southern District of New York, not reported, also appears in such Appendix.

Basis of Jurisdiction

This petition for a writ of certiorari is being filed within ninety days from the entry of the order of the Court of Appeals and the docketing thereof as a judgment. This Court's jurisdiction is invoked pursuant to 28 USC § 1254(1).

Questions Presented

1. Has this Court's decision in *Shaffer* v. *Heitner*, 433 U.S. 186, rendered unconstitutional the theory of jurisdiction upon which *Seider* v. *Roth*, 17 N.Y.2d 111 (1966) was decided?

2. Does the mere coincidence that an insurance carrier for a non-resident defendant, who has no contacts with the forum state, has an office in such state satisfy the contact requirements elucidated in *Shaffer* v. *Heitner* (supra) and *International Shoe Co.* v. *Washington*, 326 U.S. 310?

3. Where a direct action against a defendant's insurance carrier is not permitted by state statute, may a court create the equivalent of such direct action through the attachment of such a defendant's insurance policy?

Constitutional and Statutory Provisions Involved

The provisions of the United States Constitution involved are:

> Article IV, Section 2:
>
> "The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."
>
> Amendment XIV, Section 1:
>
> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The statutory federal provisions involved are:

> The Federal Rules of Civil Procedure, Rule 64 and Rule 4(e), reproduced at pp. 3, 4 of the petition for a writ filed by the co-defendant, Luke Gillespie.

The New York Civil Practice Law & Rules involved are:

> §§ 6223 and 5201, which are reproduced at pp. 5-7 of co-defendant's petition.

The provisions of the Insurance Law of the State of New York involved are:

> § 167(1)(b), which is reproduced at p. 7 of co-defendant's petition:
>
> § 167-7:
>
> 7. Subject to the limitations and conditions of subsection one, paragraph (b), an action may be maintained by the following persons against the insurer upon any policy or contract of liability insurance which is governed by said paragraph (b), to recover the amount of a judgment against the insured or his personal representative.
>
> (a) Any person who, or the personal representative of any person who, has obtained a judgment against the insured or his personal representative, for damages for injury sustained or loss or damage occasioned during the life of the policy or contract; and
>
> (b) Any person who, or the personal representative of any person who, has obtained a judgment against the insured or his personal representative to enforce a right of contribution or indemnity, or any person subrogated to the judgment creditor's rights under such judgment; and
>
> (c) Any assignee of a judgment obtained as specified in paragraph (a) or paragraph (b) of this subsection, subject further to the limitation contained in section forty-one, subsection two, of the personal property law.

Statement of Case

Petitioner is a defendant in the action instituted by respondents, the plaintiffs herein, in the United States District Court for the Southern District of New York.

The questions of law raised by this petition are identical with those raised by the co-defendant, Dr. Luke Gillespie, in his petition for a writ of certiorari.

Respondents sue on a claim for personal injuries and loss of services alleged to have been sustained at the Boston Hospital for Women in Boston, Massachusetts, caused by the alleged negligence of Dr. Gillespie and of such hospital.

It is admitted that both the Boston Hospital for Women and Dr. Gillespie then were, and still are, Massachusetts residents and have no contacts of any kind with the State of New York.

Quasi-in-rem jurisdiction of petitioner was obtained, pursuant to *Seider* v. *Roth*, by the attachment in New York of a liability policy issued by the St. Paul Fire & Marine Insurance Company to petitioner.

After this Court had decided *Schaffer* v. *Heitner (supra)* this petitioner and said co-defendant, sought an order vacating and setting aside the order of attachment herein on the ground that *Schaffer* v. *Heitner* rendered unconstitutional jurisdiction obtained by the *Seider* v. *Roth* route. Such application was denied by Judge Morris E. Lasker in his endorsement order dated October 21, 1977. In such order Judge Lasker certified that the issues raised by the motions involved controlling questions of law as to which there were substantial grounds for differences of opinion

within the meaning of 28 U.S.C. § 1292(b). The Court of Appeals, Second Circuit, then granted leave to prosecute the appeal. Sua sponte it joined the appeal in this action with similar appeals in other cases and heard them all jointly.

In its opinion and order dated June 12, 1978, sub nom. *O'Connor* v. *Lee-Hy Paving Corp.*, the United States Court of Appeals, Second Circuit, affirmed the orders of the District Courts in each of the matters under review. In so doing that Court held in essence that the attachment procedure, first enunciated in the State of New York in *Seider* v. *Roth, supra*, wherein jurisdiction over the non-resident insureds was obtained in the District Courts by virtue of an attachment of a policy of public liability insurance, met the contact requirements of *Shaffer* v. *Heitner (supra)* and *International Shoe Co.* v. *Washington (supra)*.

The reasoning in Judge Friendly's opinion written for the Court paralleled the reasoning in his earlier opinion in *Minichiello* v. *Rosenberg*, 410 F.2d 106, aff'd on rehearing en banc 410 F.2d 117, cert. den. 396 U.S. 844, and also the decision of District Judge Dooling in *O'Connor* v. *Lee-Hy Paving Corp.*, 437 F. Supp. 994. It further held that the commencement of the action by the attachment of the liability insurance policy was "in fact" a direct action against the insurer whom it described as the real party in interest with the insured being only a nominal defendant.

REASONS FOR GRANTING THE WRIT

I.

The decision of the Court of Appeals conflicts with the controlling decision of this Court.

Where, as in the instant petition, the order, sought to be reviewed, conflicts with a controlling decision of this Court, a petition for a writ of certiorari has been granted. (Cf. *Schlude* v. *Commissioner*, 372 U.S. 128; *Wilkinson* v. *U.S.*, 365 U.S. 399; *Braen* v. *Pfeifer Transportation*, 361 U.S. 129).

Underlying the decision in *Minichiello* v. *Rosenberg (supra)* which affirmed the constitutionality of jurisdiction by the *Seider* v. *Roth* route was this Court's decision in *Harris* v. *Balk*, 198 U.S. 215. Judge Friendly there stated, (410 F.2d 117, 118):

> "Appellants complain we did not adequately focus on the burden to a nonresident of having to defend a personal-injury action in another state, conceivably far from his domicile and the place of the accident, simply because his liability insurer has chosen to do business there.
>
> We find this argument unpersuasive so long as Harris v. Balk, 198 U.S. 215, 25 S.Ct. 625, 49 L.Ed. 1023 (1905), stands."

Similarly, Judge Matthew Jasen in his concurring opinion in *Donawitz* v. *Danek*, 42 NY2d 138, decided June 14, 1977, which by dictum, reaffirmed the viability of these attachments, observed that such attachments were bottomed upon the decision of this Court in *Harris* v. *Balk, supra.* Judge Jasen then opined that:

> "Until such time as the Supreme Court chooses to overrule (Harris v. Balk) and that time may not be far off, State Courts are bound by it."

In *Schaffer* v. *Heitner*, this Court for all intents and purposes overruled *Harris* v. *Balk* as a basis for quasi-in-rem jurisdiction. Thus, Mr. Justice Marshal wrote at 433 U.S. 208, 209:

> "It appears, therefore, that jurisdiction over many types of actions which now are or might be brought in rem would not be affected by a holding that any assertion of state-court jurisdiction must satisfy the International Shoe standard. For the type of quasi in rem action typified by Harris v. Balk and the present case, however, accepting the proposed analysis would result in significant change. These are cases where the property which now serves as the basis for state-court jurisdiction is completely unrelated to the plaintiff's cause of action. Thus, although the presence of the defendant's property in a State might suggest the existence of other ties among the defendant, the State, and the litigation, the presence of the property alone would not support the State's jurisdiction. If those other ties did not exist, cases over which the State is now thought to have jurisdiction could not be brought in that forum."

The *Schaffer* decision clearly reflects the view that quasi-in-rem jurisdiction cannot constitutionally be obtained solely by the attachment of an unrelated "debt".

This Court signified that view when, only three days after the *Schaffer* decision on June 24, 1977, it was decided *Rush* v. *Savchuk*, —— U.S. ——, 97 S. Ct. 2964.

In *Savchuk* v. *Rush*, —— Minn. ——, 245 N.W.2d 624 the Supreme Court of Minnesota had upheld the constitu-

tionality of quasi-in-rem jurisdiction obtained pursuant to Minn. St. 571.41, subd. 2, and Rule 4.04(2) of the Minnesota Rules of Civil Procedure. These statutes legislatively parallel the *Seider* v. *Roth* rule established by the New York Court of Appeals.

In what was perhaps an excess of caution the defendants in *Savchuk* v. *Rush* sought to appeal to this Court by two routes; by filing a direct notice of appeal from the Minnesota Supreme Court decision and by petitioning for a writ of certiorari.

On June 27, 1977, this Court decided:

> "Appeal from the Supreme Court of Minnesota. Judgment vacated and case remanded to the Supreme Court of Minnesota for further consideration in light of *Shaffer* v. *Heitner*, 433 U.S. ——, 53 L Ed 2d 97 S.Ct. —— (1977)."

It appears reasonably clear that this Court vacated such judgment and remanded the case to the Supreme Court of Minnesota to give that court the opportunity to explore whether the individual defendant did indeed have contacts with the State of Minnesota sufficient to justify jurisdiction "in light of *Shaffer* v. *Heitner*".

We shall not here fully develop our arguments that the Court of Appeals. has erred in its decision in this case. We confine ourselves to demonstrating that the petition for a writ shall be granted in order that the unconstitutionality of the *Seider* route to quasi-in-rem jurisdiction may be fully argued "in light of *Shaffer* v. *Heitner*".

II.

The decision below conflicts with prior decisions of other federal Courts of Appeal.

Where, as in the instant petition, a decision by a Court of Appeals conflicts with decisions of sister circuits, this Court may grant a petition for certiorari to resolve the apparent conflicts (*Avco Corp.* v. *Aero Lodge*, 390 U.S. 557; *Northeastern* v. *U.S.*, 387 U.S. 213). It is submitted that the order and decision herein is in substantial conflict with the decisions by the United States Court of Appeals, Fifth Circuit, in *Kirchman* v. *Mikula*, 443 F. 2d 816 and the United States Court of Appeals, Third Circuit, in *Robinson* v. *O. F. Shearer & Sons Inc.*, 429 F. 2d 83.

In *Kirchman* v. *Mikula, supra,* and *Robinson* v. *O. F. Shearer & Sons, Inc., supra,* each of the Federal Courts of Appeals involved, determined, that the *Seider* method to obtain jurisdiction over the non-resident defendant was improper.

In light of these conflicts among sister Courts of Appeal, it is urged that the issues raised by *Seider* be resolved by this Court.

III.

The application of the *Seider* rule, now approved by the United States Court of Appeals, 2d Cir., has led to discrimination between citizens of different states thus creating unnecessary interstate conflicts and constitutional problems involving Article IV, Section 2, of the United States Constitution and Amendment XIV, Section 1, thereto.

Forbes v. *Boynton,* 131 N.H. 617, 313 A. 2d 129 (1973) explicitly approved the *Seider* rule and pursuant to it, took quasi-in-rem jurisdiction over a New York defendant. However, in so doing, it stated at 313 A. 2d 133:

> "We are not holding that the Seider rule is to be applied generally to all cases of foreign motorists insured by a company with an office in this State and licensed to do business in New Hampshire. We are merely holding that under the circumstances of this case in a suit by a resident of New Hampshire against a resident of New York where the Seider rule prevails, the trial court properly denied the defendant's motion to dismiss plaintiff's action."

In *Robitaille* v. *Orciuch,* 382 F. Supp. 977 (United States District Court for the District of New Hampshire, 1974) plaintiffs claimed quasi-in-rem jurisdiction over a Connecticut resident by the *Seider* route.

The court denied such jurisdiction, stating:

> "In light of the Supreme Court's restrictive language in *Boynton* and the jurisdictional quagmire that *Seider* has produced, I hold that the plaintiffs lacked jurisdiction to proceed in this court."

The District Court reconciled disclaiming *Seider* jurisdiction over a Connecticut resident although New Hamp-

shire had taken *Seider* jurisdiction over a New York resident by stating:

> "The other real distinction is that the present defendants are Connecticut residents. Connecticut does not have the *Seider* rule. A Connecticut resident would not, if the roles had been reversed, been able to obtain judicial relief for injuries received."

Thus, New Hampshire has adopted a rule of reciprocity and converted its generally beneficient meaning of "what you do *for* me, I will do *for* you" into a perjorative one of "what you do *to* me, I will do *to* you."

In so doing, it denied to a New York citizen an immunity it afforded a citizen of Connecticut; in so doing, it denied to a citizen of New York the protection of its laws equal to the protection it gave to a Connecticut citizen.

CONCLUSION

For the foregoing reasons we respectfully request that this petition for a writ of certiorari be granted.

Respectfully submitted,

Solomon M. Cheser
Counsel for Petitioner
116 John Street
New York, New York 10038
(212) 233-5100

APPENDIX

The Order of the United States Circuit Court of Appeals, 2nd Circuit, dated June 12, 1978, is reproduced at page 1a in the Appendix to the petition of Dr. Luke Gillespie.

The Opinion of that court is reproduced at page 3a in the Appendix to the petition of Dr. Luke Gillespie.

The endorsement order of District Judge Morris E. Lasker, dated October 21, 1977, is reproduced at page 29a in the Appendix to the petition of Dr. Luke Gillespie.

The Order of the United States Circuit Court of Appeals, 2nd Circuit, docketed as a judgment on July 17, 1978, infra.

The Order of the United States Court of Appeals for the Second Circuit Docketed as a Judgment July 17, 1978

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twelfth day of June one thousand nine hundred and seventy-eight.

Present:

HON. HENRY J. FRIENDLY
HON. MURRAY I. GURFEIN
HON. THOMAS J. MESKILL
Circuit Judges

71 Civ. 1562
MEL

Filed—June 12, 1978

MARGUERITE T. O'CONNOR, as Administratrix of the Goods, Chattels and Credits of DANIEL J. O'CONNOR, Deceased,

Plaintiff-Appellee,

v.

LEE-HY PAVING CORP. and DAVIS E. CLEM,

Defendants-Appellants.

78-7050
78-7051

The Order of the United States Court of Appeals for the Second Circuit Docketed as a Judgment July 17, 1978

FONTINI KOTSONIS, individually and as Administratrix of the Estate of PADIAS KOTSONIS,

Plaintiff-Respondent-Appellee,

v.

SUPERIOR MOTOR EXPRESS, EARNHARDT LUMBER CO., and the Estate of KENNETH EDWARD BENTLEY,

Defendants-Petitioners-Appellants.

78-7058

GLORIA SCHWARTZ and WILLIAM SCHWARTZ,

Plaintiffs-Appellees,

v.

BOSTON HOSPITAL FOR WOMEN, also known as Boston Lying In Hospital, and LUKE GILLESPIE,

Defendants-Appellants.

78-7076
78-7044

VINCENT J. FERRUZZO,

Plaintiff-Appellee,

v.

BRIGHT TRUCKING INC., JOE E. LARSON and LANDY OF WISCONSIN, INC.,

Defendants-Appellants.

78-7047

The Order of the United States Court of Appeals for the Second Circuit Docketed as a Judgment July 17, 1978

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for he Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the Orders of said District Court be and they hereby are affirmed in accordance with the opinion of this court with costs to be taxed against the appellants.

Docketed as
a judgment #78,1111
on July 17, 1978

A. Daniel Fusaro,
Clerk
By Arthur Heller
Deputy Clerk

A true copy

A. Daniel Fusaro
by
Carolyn Clark Campbell
Deputy Clerk